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Note from the Field

On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development

Lisa J. Laplante[†]

While academics debate the ranking of rights, information from the field demonstrates their indivisibility. This Article explores how truth commissions provide rich documentation of the interrelation between violations of Civil and Political Rights (CPR) and Economic, Social and Cultural Rights (ESCR), using Peru's Truth and Reconciliation Commission (TRC) as an example. The TRC's findings show how social and economic inequalities contributed to the eruption of political violence, which further exacerbated these conditions. This revelation challenged the TRC to develop a reparation plan that adequately responded to the needs of victim-survivors, while maintaining a causal link with damage caused by the conflict. Ultimately, the TRC focused narrowly on repairing damage caused by CPR violations. Yet now, almost four years later, the government confuses development with traditional reparation measures, generating criticism. The author proposes that Peru's post-conflict recovery may need to accept the overlap between reparations and development to improve the "well being" of its intended beneficiaries.

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INTRODUCTION

Is one set of rights more valid than the other? This question has driven the rights hierarchy debate for decades.¹ In essence, the debate revolves around whether economic, social and cultural rights ("ESCR"), such as the right to health, housing or food, are valued differently from civil and political rights ("CPR"), such as the right to free speech, liberty and life, or if all are "interdependent, interrelated, and of equal importance".² The debate originated with the division of human rights into two covenants, the International Covenant of Civil and Political Rights (ICCPR)³ and the International Covenant of Economic, Social and Cultural Rights (ICESCR).⁴ This division bred two schools of thought: one viewing all rights as equal and indivisible, and the other viewing ESCR as mere aspirations.⁵

If theoretical debate does not settle the indivisibility question, simple reality should. Everyday life, especially in poor countries with histories of political violence and repressive governments, prove the impossibility of dividing rights into generations, especially when the guiding criterion is valuing life and dignity. Powerful documentaries, books and reports show the human face of these rights, providing the most persuasive arguments for disbanding with ranking. For example, physician and anthropologist Paul Farmer documents how structural violence in the form of poverty and social injustices cause life and death situations in countries such as Haiti, Russia and Mexico.⁶ Denials of social rights that lead to death beg the question as to whether such protections are essential for human dignity and life.

This Article proposes that the work of truth commissions may help demonstrate the indivisibility of rights. Truth commissions have become a popular mechanism within the transitional justice field for addressing past episodes of political violence and repression.⁷ Until now, however, they have generally focused on providing clarification of, reparation for, and more recently, punishment for, CPR violations.⁸ Yet a truth commission

1. PETER R. BAEHR, HUMAN RIGHTS: UNIVERSALITY IN PRACTICE 5 (2002).

2. Brigit Toebes, *Towards an Improved Understanding of the International Human Right to Health*, 21 HUM. RTS. Q. 661, 661 (1999).

3. International Covenant on Civil and Political Rights, G.A. Res. 2200 at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR].

4. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Jan. 3, 1976) [hereinafter ICESCR].

5. See Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837, 838-9, 859 (2002) [hereinafter Sengupta].

6. See generally PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE WAR ON THE POOR* (2003) (describing Farmer's observations of structural violence in Haiti, Cuba, Mexico and Russia).

7. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 78 (2003) (describing the rise of truth commissions as a transitional justice model).

8. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 14-19 (2001) (discussing the traditional role of truth commissions to investigate

process that clarifies the context, causes and consequences of political violence and internal armed conflict might provide rich documentation of the symbiotic relation between the different generations of rights. Even when truth commissions choose not to take positions on the violations of ESCR, they may still provide compelling evidence of the interrelatedness of ESCR and CPR—in terms of causes and consequences arising out of the same series of events.

This Article explores this proposition through a case study of Peru based on the Author's field research.⁹ Like other countries in Latin America, Peru fought its own war against insurgent rebel groups. Specifically, in 1980 the self-declared Maoist group *Sendero Luminoso* ("Shining Path" or "SL") declared war on the state to make way for its own utopian visions.¹⁰ SL soon resorted to viciously violent tactics that provoked equally violent reactions from the armed forces and led to the death and disappearance of thousands of Peruvians, mostly in the rural, poor countryside. Although the major leaders of SL were imprisoned in the early 1990s under authoritarian leader Alberto Fujimori's draconian anti-terrorist laws, official brutality continued and the conflict did not truly end until 2000, when a series of corruption scandals forced Fujimori to flee to Japan and resign from the presidency.¹¹

An interim government created Peru's Truth and Reconciliation Commission ("TRC") in 2001 to address this violent past by investigating the causes, consequences and responsibilities of the conflict. Laboring for

responsibility for political violence and repression); NAOMI ROHT-ARRIAZA & JAVIER MARIEZCURRENA, *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 2 (2006) (acknowledging the criticism of truth commissions for "ignoring root causes and privileging civil and political rights over economic, social and cultural rights."); Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, in *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 262, 263 (Neil J. Kritz, ed., 1995) [hereinafter Kritz].

9. The findings shared in this article arise out an accumulation of research during the Author's five years as a participant observer in Peru. The Author first began to observe the issues discussed in the article as a researcher with the Peruvian Truth and Reconciliation Commission (TRC) in 2002, which included observing the work of the Area of Reparations. After her work at the TRC, she began working with victim-survivors in their struggle for justice and reparations, including attending their weekly assemblies and meetings from which she had first hand observations on their contentions about non-individualized reparations. A more recent multi-sited ethnographic study "After the Truth: The Politics of Reparations in Post-Truth Commission Peru," funded by the United States Institute of Peace, which addresses a wider universe of research questions, has made it possible to consolidate the Author's ongoing observations with regard to the issues presented in this Article. In particular, it has generated new field evidence through on-site observations, field notes, one-on-one interviews, archival retrieval and focus groups with a variety of social actors, including state officials, members of civil society, and victim-survivors.

10. For a detailed narrative of Peru's internal armed conflict, see generally GUSTAVO GORRITI, *THE SHINING PATH* (1999).

11. In 1992, the primary leaders of Sendero Luminoso, and the other insurgent group, Tupac Amaru Revolutionary Movement (MRTA), were imprisoned and their violent campaign subsided. However, Fujimori continued with his repressive policies. Thus, the TRC considered the time frame of the internal armed conflict to continue until Fujimori's regime fell, despite the decline in combat between the insurgent groups and government.

two years, and collecting some 17,000 private and public testimonies, the TRC issued its nine-volume Final Report in August 2003.¹² The TRC concluded that an estimated 70,000 people were killed during the conflict and thousands more were disappeared, displaced, tortured, and unjustly imprisoned. Significantly, the TRC dedicated an entire volume to the causes of the war, delving into the social, economic and cultural inequalities that fueled the insurgency.¹³ The TRC concluded that the conflict worsened already dire social, economic and cultural conditions. In response, it issued a series of recommendations that included criminal trials, institutional reform and the Plan Integral de Reparaciones ("PIR"),¹⁴ all intended to both respond to the harm caused by the conflict, and also to erect institutional protections so that the violence *nunca más se repite* (never again repeats).¹⁵

In Part II, this Article shares Peru's experience in order to illustrate how a truth commission, with the benefit of an expansive mandate, can provide rich documentation of on-the-ground indivisibility of CPR and ESCR before, during, and after the conflict. Moving beyond simply listing an inventory of human rights violations, the TRC provided a more holistic view of Peru's conflict to help inform post-conflict recovery and prevention strategies. However, as a caveat, in Part III the Author shares how this more expansive approach has complicated the pressing task of designing a reparations program that addresses and satisfies the expectations of victim-survivors of Peru's war. Indeed, the current needs of those entitled to reparations often have roots tracing back to violations of both ESCR and CPR. The Author narrates the TRC's struggle with the indivisibility principle in formulating its recommendations for reparations, and how it chose as the "point of entry" for determining reparations the causal link to direct damage caused by the latter rights.

As a result, now, almost four years since the TRC presented its Final Report, the government's attempts to implement these measures generate confusion and tension. Collective and non-pecuniary individual

12. COMISION DE LA VERDAD Y RECONCILIACION, INFORME FINAL 2003, available at <http://www.cverdad.org.pe/ifinal/index.php> [hereinafter, TRC Final Report].

13. *Id.* at Vol. VIII, Part 2.

14. *Id.* at Vol. IX, Part 4, Ch. 2. Institutional reform refers generally to a series of recommendations for reforming the state, such as the judicial apparatus, the military and police, the educational system, among others, with an eye towards creating the rule of law and a culture of rights believed necessary for preventing future regression to violence. See Hayner, *supra* note 8, at 154-69.

15. In Latin America, the term *nunca más* (never again) was the name used by the Argentinean Truth Commission for its final report, which coined a term now frequently invoked by countries undergoing transitions to explain why they are pursuing justice and reparations. In Peru, the similar phrase *para que no se repite* (so it never happens again) has become the popular jargon for justifying the country's current efforts to address its past. For instance, in one of his public speeches, ex-president of the TRC Salomón Lerner Febres justified the work of the TRC, in particular its investigations of human rights violations, in order to change Peruvian society *para que tales desgracias no se repitan* (so such horrors do not repeat). *Sociedad civil y comisiones de la verdad en América Latina*, in LA REBELION DE LA MEMORIA: SELECCION DE DISCURSOS 2001-2003, 41 (2004).

reparations closely resemble ESCR and development measures and thus cause victim-survivors to express great dissatisfaction since they feel the government is insufficiently responsive to individualized CPR violations. Rather, they perceive these collective reparations as part of pre-existing obligations of the state to promote development. This experience points towards a new dilemma in transitional justice contexts: to find the appropriate approach to reparations that at once acknowledges harm suffered from CPR violations within a larger approach that embraces the indivisibility of the different generations of rights. In Part IV, the Article concludes with the suggestion that this predicament merely demonstrates the impossibility of dividing rights, but that it perhaps provides an important key to more adequately facilitating the overarching goal of prevention in post-conflict recovery.

I. TRANSITIONAL JUSTICE, TRUTH COMMISSIONS, AND THE INDIVISIBILITY OF RIGHTS

Professor Ruti Teitel defines transitional justice as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹⁶ In general, the discipline of transitional justice recognizes that, due to political and historical realities, traditional justice mechanisms may be inadequate during political transitions towards liberal democracy.¹⁷ Often, inadequate or corrupt judicial institutions give rise to or permit repression and political violence, and the same problems continue during political transitions. Similarly, traditional judicial mechanisms may simply be incapable of addressing episodes of massive human rights violations. Alternatively, political compromise and the quest for peace and reconciliation often require more leniency and less strict adherence to norms of criminal justice.¹⁸

Given the tensions inherent in balancing absolute traditional justice through criminal trials with political compromises like selective prosecutions and amnesties, the transitional justice approach generates lively debate that has grown in complexity over the years, prompting continued development of transitional justice mechanisms.¹⁹ Teitel traces the genealogy of this evolution back to World War I,²⁰ although the South African Truth and Reconciliation Commission significantly increased the popularity of transitional justice only a decade ago, bringing the topic of truth commissions to “the center of international attention.”²¹

16. Teitel, *supra* note 7, at 69.

17. See Jamal Benomar, *Justice after Transitions*, in Kritz, *supra* note 8, at 32, 41.

18. Carla Hesse & Robert Post, *Introduction*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 13, 20-21 (Carla Hesse & Robert Post eds., 1999).

19. For further discussion, see generally ROHT-ARRIAZA AND MARIEZCURRENA, *supra* note 8 (outlining the debate over TRCs).

20. Teitel, *supra* note 7, at 70.

21. Hayner, *supra* note 8, at 5. For a general discussion of South Africa Truth Commission, see Richard Wilson, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA*:

Indeed, even though the truth commission model arose almost thirty years ago with mixed results, only in recent years has it become “the darling” of the transitional justice movement.²² While models for truth commissions vary depending on local conditions, they typically consist of a temporary investigatory body whose mandate includes establishing an official historical record of episodes of violence, repression and other situations that give rise to human rights violations.²³ Truth commissions are sometimes controversial when they appear to displace traditional justice mechanisms in an exchange of truth for justice.²⁴ Some argue, however, that, in some instances, they may be preferable for a number of reasons. When criminal prosecutions are impossible due to political exigencies, truth commissions respond to the vacuum left by compromised justice—a next best option.²⁵ In addition, some academics have recognized the limits of the law in addressing violent regimes.²⁶ Alternative mechanisms like truth commissions may actually be more capable of promoting post conflict recovery. They may provide better frameworks for restorative justice than individualized trials, especially because they can recommend reparations plans for a wide category of victim-survivors—those persons directly harmed by human rights violations, as well as their families.²⁷ Moreover, unlike criminal trials that sideline victim-survivors to the role of witnesses to determine criminal liability, truth commissions can provide healing forums that focus specifically on the voices of victim-survivors.²⁸

LEGITIMIZING THE POST-APARTHEID STATE (2001).

22. John Torpey, *Introduction: Politics and the Past*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 1, 9 (John Torpey ed., 2003).

23. Popkin & Roht-Arriaza, *supra* note 8, at 269.

24. See, e.g., Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 22, 22 (Robert I. Rotberg & Dennis Thompson eds., 2000) (“By the terms of their charters, these commissions sacrifice the pursuit of justice as usually understood for the sake of promoting other social purposes, such as historical truth and social reconciliation.”).

25. Lynn Berat & Yossi Shain, *Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase*, 20 L. & SOC. INQUIRY 163, 166 (1995).

26. See, e.g., Jennifer L. Balint, *The Place of Law in Addressing Internal Regime Conflicts*, 59 L. & CONTEMPORARY PROB. 103 (1996) (exploring the limits of law in post-conflict situations and discussing different functions of different types of institutions in post-conflict recovery).

27. The specific category of victim may vary depending on the nature of the violation but may include persons killed, disappeared, kidnapped, tortured, raped, displaced, arbitrarily and unlawfully imprisoned, among other types of harms. While orphans and widow(ers) may be considered beneficiaries of reparations for those direct victims who are killed or missing, jurisprudence has begun to recognize their separate right to reparations. For discussion, see JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 235-39 (2003).

28. See, e.g., Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 236 (Robert I. Rotberg & Dennis Thompson eds., 2000). Elsewhere the Author questions the healing potential of truth commissions if they are not followed by concrete measures like reparations. See Laplante & Theidon, *supra* note 8. See also Brandon Hamber, *Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* (Nigel Biggar ed., 2003).

Importantly, unlike criminal trials in which each party presents its version of a finite set of facts, truth commissions offer the opportunity to delve more deeply into collective truths, including the causes and history of a country's violent and repressive past. It is important to note, however, that when discussing the importance of truth and "collective memory," most transitional justice literature focuses on the need to reveal the facts about human rights violations and less frequently mention the need to explore the truth about the factors and conditions that led those violations.²⁹ If, however, the overarching aim of a truth commission is *prevention*, as it was in Peru (as reflected in the expression *nunca mas*), the historical causes of political violence and conflict become highly relevant. This is especially true when it comes time to formulate proactive responses, such as institutional, social, and economic reforms needed to promote this end. Despite its importance, findings regarding the factors and conditions that led to CPR violations can actually confuse the task of designing reparations, which will be examined in Part III, after an initial discussion of how the TRC's mandate directed its investigations to explore *why* the internal armed conflict occurred.

A. Expanded Mandate: The TRC Looks at Why the Political Violence Occurred

Peru's TRC became possible only after Fujimori fled Peru in the wake of corruption scandals, thereby ending its twenty-year internal armed conflict. While awaiting a new presidential election, the interim government seized the opportunity to seek ways of addressing its tragic past by forming a special working committee to develop recommendations towards this end. Susan Villaran, then Peruvian Minister of Women and Development, who participated in this committee, explained that the idea of a truth commission arose due to the very important need to clarify the many "truths" of all the different actors in the conflict, and explain *why* Peru's prolonged episode of political violence occurred.³⁰

Upon receiving the recommendations of the working committee, interim president Valentín Paniagua issued an executive decree creating a truth commission. The TRC's overall mandate was to investigate the causes and consequences of the internal armed conflict, and included a directive to "analyze the social, political and cultural conditions, as well as the

29. For discussions that emphasize documenting the violent and repressive acts of past regimes more, and do not concur in the need to explore historical events and conditions that may have led to these violent episodes, see Popkin & Roht-Arriaza, *supra* note 23; Donald W. Shriver, Jr., *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?* 16 J. L. & RELIGION 1 (2001); Priscilla B. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 L. & CONTEMP. PROB. 173 (1996); ALEXANDRA BARAHONA DE BRITO ET. AL., *THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES* (2001).

30. Interview with Susana Villaran, former Peruvian Minister of Women and Development, in Lima, Peru (July 17, 2006).

behaviors of society and State institutions, that contributed to the tragic violence that occurred in Peru.”³¹ This broad focus influenced the 12 commissioners, a largely interdisciplinary team with a notable presence of national academics, to present much more than just an inventory of human rights violations and patterns. Rather, it consulted with experts from social sciences, history and journalism, as well as secondary reports and studies undertaken by both the government and private persons and institutions to explore the causes and consequences of the political violence.

In going beyond the traditional orientation of truth commissions, which have emphasized the clarification of human rights atrocities that constitute violations of CPR, the TRC may indicate a new trend.³² Specifically, truth commissions, while carefully documenting specific types of CPR violations, traditionally have devoted less attention to explaining *why* these abuses occurred. Truth commission reports, such as Argentina’s *Nunca Mas*,³³ Chile’s Rettig Report,³⁴ and El Salvador’s *From Madness to Hope*, present brief explanations of political polarization, repressive state apparatuses, corrupt judiciaries, faulty rule of law and other institutional-type defects.³⁵ However, more recent experiences, such as the truth commission reports issued by Guatemala and Peru, have delved more deeply into the historical social and economic causes and conditions that led to the country’s “dirty war.”³⁶ The practical results of this wider approach to truth commission investigations contributes to our understanding of whether CPR can truly be divided from ECSRs on the ground.

B. Reality on the ground: the indivisibility and enforceability of rights

Interestingly, at its conception in 1948, human rights emerged as a unified body, as reflected in the Universal Declaration of Human Rights (“UDHR”).³⁷ In the UDHR, the concept of respecting “the inherent dignity

31. Decreto Supremo de Peru, N° 065-2001-PCM., Art. 2(a), available at <http://www.cverdad.org.pe/lacomision/cnormas/normas01.php>.

32. Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 H. RTS. Q. 597 (1994).

33. La Comision Nacional Sobre la Desparicion de Personas, *Nunca Mas: Informe de la Comision Nacional Sobre la Desparacion de Personas* (1984), available at http://www.nuncamas.org/english/library/nevagain/nevagain_178.htm.

34. Chilean National Commission on Truth and Reconciliation, Report of the Chilean National Commission on Truth and Reconciliation (1991), available at http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html.

35. COMMISSION ON THE TRUTH FOR EL SALVADOR, FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR: REPORT OF THE COMMISSION ON THE TRUTH FOR EL SALVADOR (1993), available at http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993_toc.html.

36. See COMISION PARA EL ESCLARECIMIENTO HISTORICA, MEMORIA DE SILENCIO ch. 1 (1999), available at <http://shr.aaas.org/guatemala/ceh/mds/spanish/toc.html>; TRC Final Report, *supra* note 12, at Vol. VIII, Part 2.

37. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]. See generally JOHANNES MORSINK, THE UNIVERSAL DECLARATION

of and the equal and inalienable rights of all members of the human family" encompassed both CPR, such as the right to life, liberty, and thought,³⁸ and ESCR, such as the right to work, health, and education.³⁹ While the former rights are considered "negative" rights that require the state to refrain from interfering with individual freedoms and liberties, the latter are "positive" rights that require the state to take affirmative steps to realize them.⁴⁰ However, the birth of the human rights movement also took place at a time when the Cold War's ideological battles undermined the assumption of universality with respect to ESCR, whose tenor rung uncomfortably close to communism.⁴¹

Indeed, this political context shaped international negotiations while memorializing these rights into binding treaties. Certainly, even though the spirit of human rights emerged as a unified body, they were divided in 1968 by the creation of the ICCPR and the ICESCR as two separate covenants. This creation of two separate covenants governing human rights produced two competing views regarding the hierarchy of rights: one viewing all rights as equal and indivisible, and the other viewing ESCR as mere aspirations.

This debate has been fueled not just by political ideology, but also by questions of the legitimacy, enforceability and practicability of ESCR. In particular, certain clauses of the ICESCR make its provisions not immediately binding, as is the case with the rights protected by the ICCPR. In particular, Article 2(1) of the ICESCR reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.⁴²

The Limburg Principles, created in 1987 as guidelines for interpreting the ICESCR, clearly state that despite the leniency that could be read into Article 2, States parties nevertheless need "to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely

OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT (1999).

38. See, e.g., UDHR, *supra* note 37, at art. 3 (life, liberty and security) and art. 19 (opinion and expression).

39. *Id.* at Art. 23(1) (work); Art. 25(1) (health); Art. 26(1) (education).

40. Chisanga Puta-Chekwe & Nora Flood, *From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights*, in GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 39, 42 (Isfahan Merali & Valerie Oosterveld eds., 2001).

41. See generally Jack Donnelly, *Human Rights, Democracy and Development*, 21 HUM. RTS. Q. 608 (1999); MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* (1995).

42. ICESCR, *supra* note 4, at art. 2(1).

efforts to ensure full realization."⁴³ Yet, in practice, states often point to the "progressive" requirement as a pretext for not attending to ESCR, and thus complying with their international obligations, due to limited resources and budgets.⁴⁴ This assertion has salience in poor countries that can easily point to seemingly limitless societal problems and a seemingly limited budget.⁴⁵

Similarly, part of the hierarchy of rights debate arises out of the absence of an individual complaints mechanism to the ICESCR, unlike the Optional Protocol to the ICCPR, which allows individuals to bring a complaint to enforce their human rights.⁴⁶ The absence of this type of remedy has propelled some lawyers with a positivist view of rights to opine "if certain rights are not legally enforceable, they cannot be regarded as human rights. At best they can be regarded as social aspirations or statements of objectives."⁴⁷ In particular, they argue that second generation rights are "imperfect" obligations that obfuscate responsibility by not identifying "specific agent" responsibility.⁴⁸ This concept, however, relies on a conventional approach to justiciability as determining liability through judicial processes, in which identifying the culprit triggers the prerequisite liability that defines the obligation to repair. Harvard Professor Stephen P. Marks explains that even if social rights do not correspond to the types of "immediate individual remedies" usually available through the courts, they are still legal obligations.⁴⁹

43. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 21, U.N. Econ. and Soc. Council Official Records [ESCOR], Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1987/17/Annex (Jan. 8, 1987), available at <http://www.unimaas.nl/bestand.asp?id=2453> [hereinafter Limburg Principles].

44. Audrey R. Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23 (1996). It should be noted that the Limburg Principles, formulated at the University of Limburg (Maastricht, The Netherlands), laid down the principles that:

[T]he obligation to achieve progressively the full realization of the rights requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.

Limburg Principles, *supra* note 43. Similarly, Article 10 of the Declaration on the Right to Development states: "Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels." Declaration on the Right to Development, G.A. Res. 41/128, art. 10, UN Doc. A/RES/41/12: (Dec. 4, 1986) [hereinafter Declaration RTD].

45. Article 2(3) of the ICESCR permits developing countries to consider their national economy when determining "to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." ICESCR, *supra* note 4, at Art. 2(3).

46. See generally Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaint Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?* 98 AM. J. INT'L L. 462 (2004).

47. See Sengupta, *supra* note 5, at 859.

48. *Id.* at 856.

49. Stephen P. Marks, *The Human Rights Framework for Development: Five Approaches* 12, 14 (François-Xavier Bagnoud Center for Health and Human Rights at Harvard University,

Regardless of the valiant struggle to preserve the integrity of the ESCR, the result of this still unresolved debate can be seen in the way that ESCR are relegated to the lower rank of "second generation" rights,⁵⁰ and the way in which the right to development ("RTD"), which recognizes collective rights of people, is assigned to the even more removed category of a "third generation" solidarity right.⁵¹ Thus, the U.N. has issued various declarations and guidelines to try to resolve this ongoing struggle, at times only further embodying this tension. For example, the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on June 25, 1993, declares that "[a]ll human rights are universal, indivisible and interdependent and interrelated."⁵² However, the Declaration goes on to indicate that "[w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds *must be borne in mind*, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."⁵³ The language in the first clause of this statement is a concession to those who view ESCR as aspirational; it suggests that a country minimize its observance of its ECSR obligations, and further reveals the inherent tension in resolving the indivisibility debate.

Yet only five years later, the Maastricht Guidelines reflect a new global trend in which increasing ESCR advocacy coupled with a growing global protest against social and economic disparities has helped call the indivisibility debate into question.⁵⁴ The Maastricht guidelines state: "It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as

Working Paper No. 6, 2000), available at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP6--Marks.pdf.

50. Sengupta, *supra* note 5, at 859-61 (describing the subordinate status of economic and social rights in relation to more established categories of human rights; discussing critical views of the justiciability of economic and social rights).

51. See Carl Wellman, *Solidarity, the Individual and Human Rights*, 22 HUM. RTS. Q. 639, 639-41 (2000) (discussing the genesis and subordinate status of third-generation rights, including the right to development).

52. World Conference on Human Rights, June 14-25, 1993 Vienna Declaration and Programme Of Action, ¶ 5, U.N. Doc. A/CONF.157/231 (July 12, 1993).

53. *Id.* (emphasis added).

54. For instance, the first paragraph of the Maastricht Guidelines note:

Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people, while they have advanced also at a dramatic pace for more than a quarter of the world's population. The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4 percent of the global income and the richest fifth 85 percent. The impact of these disparities on the lives of people - especially the poor - is dramatic and renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity.

The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, art. 1, reprinted in, 20 HUM. RTS. Q. 691, 691-92 (1998).

they are for violations of civil and political rights.”⁵⁵ Such certainty indicates that the indivisibility claim is no longer controversial.⁵⁶ Yet, as explained by professor Peter Uvin, “[a]t the conceptual level, [the rights] separation has been dismantled over the last two decades, and human rights declarations nowadays always refer to the indivisibility and complementariness of the two categories of human rights. In practice, however, most people still treat them very much as separate.”⁵⁷

In response to ESCR marginalization through states’ interpretation of the ICESCR’s apparent leniency, advocates have adopted a “violations” approach to understanding ESCR.⁵⁸ Indeed, consistent with traditional human rights advocacy, this tactic “shames” nations by revealing to the international community the dire consequences of not protecting ESCR.⁵⁹ This approach is supported by the Committee on Economic, Social and Cultural Rights’ “minimum core obligation” test, which requires that, at the very least, the state ensure that each right be satisfied at some essential level.⁶⁰ That is, “a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, or basic shelter and housing or of the most basic form of education is *prima facie* violating the Covenant.”⁶¹ A wider analysis invokes the “obligation of conduct,” as opposed to the “obligation of result” in discerning obligations to respect, protect, and fulfill the ICESCR.⁶² For example, Professor Alicia Ely Yamin looks at how the failure to provide “healthy conditions” amounts to a violation of the right to health.⁶³ This approach does not limit “health status” solely to the availability of health care.

By analyzing the ESCR angle of Peru’s internal armed conflict using an approach that resembles the *violation* and *obligation of conduct* approach, the TRC reinforced the notion that rights are not easily divided in practice and also revealed the dire consequences of ignoring their interconnection.

II. INDIVISIBILITY OF RIGHTS ON THE GROUND: THE FINDINGS OF THE TRC

As mentioned, the transitional justice field constantly evolves, and

55. *Id.* at art. 4.

56. PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT 38 (2005).

57. *Id.* at 39.

58. Chapman, *supra* note 44 at 24; Victor Dankwa, Cees Flinterman & Scott Leckie, *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 705, 706 (1998).

59. See, e.g., Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 64 (2004).

60. Comm. on Econ., Soc. & Cult. Rts. [CESCR], *The Nature of States Parties Obligations*, General Comment No. 3, ¶ 11, U.N. Doc. E/1991/23 (Dec. 14, 1990).

61. *Id.* (referring to the ICESCR, *supra* note 4).

62. See *State Responsibility*, in *Report of the Commission to the General Assembly on the Work of its Twenty-Ninth Session*, ch. 2, U.N. Doc. A/CN.4/SER.A/1977/Add.1 (Part 2), reprinted in [1977] 2 Y.B. INT’L L. COMM’N, 11-19.

63. Alicia Ely Yamin, *Defining Questions: Situating Issues of Power in the Formulation of a Right to Health under International Law*, 18 HUM. RTS. Q. 398, 410 (1996).

with it, the mechanisms used to promote its ends. To this effect, the Peruvian TRC's more expansive approach to its investigation of the causes and consequences of the internal armed conflict contributes to our understanding of the indivisible nature of rights.

A. Causes of the War: Social, Economic, and Cultural Inequalities

The TRC Final Report presents clear analysis of how social, economic and cultural inequalities contributed to and were made worse by political violence, particularly because the populations most affected by inequalities were the most targeted, first by SL, and later by the armed forces reacting to SL.⁶⁴ Taken as a whole, its findings greatly suggest a cause-effect sequence, although the TRC did not name poverty as the primary cause of the violence.⁶⁵ Still, the TRC does acknowledge poverty to be "one of the factors that contributed to igniting [this conflict] and as the backdrop against which this drama unfolded."⁶⁶ Certainly, examining the particular dynamic of Peru's war makes the link between the violence and poverty and social exclusion seem undeniable.

First, the TRC confirmed that the war ran along class and racial lines, hitting "the poorest habitants of the poorest parts of the country."⁶⁷ In particular, 40% of the estimated 70,000 dead and 12,000 disappeared came from the rural highlands of Ayacucho, inhabited primarily by subsistence farmers (*campesinos*) of indigenous descent. When including the five other poorest regions of Peru, the percentage rises to 85%.⁶⁸ The TRC clarified that of these victims, 56% were dedicated to agriculture activities, 75% spoke a native language other than Spanish, and 68% had minimal education.⁶⁹ The TRC concluded that "there exists an evident relation between social exclusion and the intensity of the violence. It was not coincidence that the four regions most affected by the internal armed conflict . . . are the five poorest in the country."⁷⁰ Thus, the TRC in its final conclusions presented a stark profile of the typical victim, concluding that

64. TRC Final Report, *supra* note 12, at vol. VIII, pt. 2.

65. Interviews with those working on the Final Report reveal a cautious approach to blaming only poverty for the political violence. Instead, they make clear that the affirmative actions of SL directly caused this violence, and it did not merely self-ignite due to poverty. One view is that poverty does not cause violence on its own, but occurs with an intervening factor, such as a revolutionary group that advocates violence. However, in Peru, there are currently ongoing eruptions of violence due to frustration over the state's failure to attend to social problems, although not instigated by an ideologically driven group. This suggests that, without an adequate state response, the frustration with poverty can lead people to react, even in desperation, with violence.

66. HATUN WILLAKUY, VERSION ABREVIADA DEL INFORME FINAL DE LA COMISION DE LA VERDAD Y RECONCILIACION 337 (2004) [hereinafter Willakuy].

67. *Id.*

68. *Id.* at 433-34, conclusion 4 (referring to the regions Junin, Huanuco, Huancavelica, Apurimac, and San Martin).

69. *Id.* at 434, conclusions 6 & 7.

70. *Id.* at 22.

"social exclusion and poverty in Peru has a rural, peasant face."⁷¹

An all too brief summary illustrates the inauspicious position held by victims: first, they were caught in the intrigue of the Maoist terrorist group SL, which started the war in Huamanga, the capital of Ayacucho Province, expanding out by infiltrating rural villages in neighboring regions. Initially, SL encroached on rural populations left unprotected, 'abandoned,' by the state, thus becoming 'an unexpected enemy' of the state. Here, SL "exploited fractures and rifts in Peruvian society"⁷² by recruiting marginalized and frustrated members of poor communities living without the "irreducible ethical minimum"⁷³ of living conditions. Through *escuelas populares* (community schools), SL's utopian promises of communism justified violent revolution in the minds of the oppressed. Where the state had more presence, and provided basic services like health, education, and security, insurgent groups were less successful.⁷⁴ As SL's strategy became increasingly brutal, it targeted the same villagers it purported to save, often for perceived disloyalty, using public executions and massacres. In turn, the state responded by declaring emergency zones in most of rural Peru, and soon after sent an unprepared military to enforce order. Often, these soldiers viewed all rural villagers as potential terrorists, thus resulting in more indiscriminate killings and massacres.⁷⁵

Significantly, the TRC clearly blames the powerful elite's attitude of indifference, disparagement, and discrimination towards this population for why cries for help went ignored. In this vein, former president of the TRC, Salomón Lerner Febres, wrote that the conflict relates to "a sector of the population historically ignored by the State and the urban society."⁷⁶ Such disregard reflects what the TRC deemed as the "multiple breaches" between the rich and poor, white and indigenous, literate and not educated, and the "abysmal differences between those who have and those who survive."⁷⁷ It also points to the unequal process of modernization, and how sustained economic development excluded most rural sectors of Peruvian society.⁷⁸ Beyond unequal distribution of riches, it also mentions unequal distribution of political and symbolic power, which also ran along ethnic lines.⁷⁹ While the TRC never explicitly calls it such, this *de facto* ethnic conflict would not have been possible without the "profound lack of appreciation for the less privileged of the country."⁸⁰

The war's dynamic demonstrates an "evident relation" between

71. *Id.*

72. *Id.* at 412.

73. This standard comes from Flavia Piovesan, *Social, Economic and Cultural Rights and Civil and Political Rights*, 1 SUR: INT'L J. HUM. RTS. 21, 24 (2004).

74. Willakuy, *supra* note 66, at 412.

75. For a more comprehensive analysis of Peru's internal armed conflict, see SHINING AND OTHER PATHS: WAR AND SOCIETY IN PERU, 1980-1995 (Steve J. Stern ed., 1998).

76. Hatun Willakuy, *supra* note 66, at 10.

77. *Id.* at 337.

78. *Id.* at 339.

79. *Id.* at 337.

80. *Id.* at 10.

poverty and social exclusion and political violence.⁸¹ Here, the TRC captures a phenomenon identified in other settings marked both by violence and social and economic inequalities. For instance, Farmer writes, “[r]ights violations are ... symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm.”⁸² Similarly, the Limberg Principles recognized that:

The systematic violation of economic, social and cultural rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.⁸³

Peru’s experience reveals the practical implications of Nobel Peace Prize winner and economist Amartya Sen’s assertion that “economic unfreedom, in the form of extreme poverty, can make a person helpless prey in the violation of other kinds of freedom Economic unfreedom can breed social unfreedom, just as social or political unfreedom can also foster economic unfreedom.”⁸⁴ It is this vulnerability that continues to haunt Peruvian victim-survivors today.

B. The Consequences of the War: Exacerbating Social and Economic Inequalities

Significantly, the TRC’s investigations further reveal how the unfolding of political violence further exacerbated these already “less than minimal” social, economic, and cultural conditions. In particular, the TRC’s chapter *Las secuelas del conflicto* (“Consequences of the Conflict”) provides a comprehensive list of psychosocial, sociopolitical and socioeconomic harms suffered at both the personal and community levels.⁸⁵ However, the TRC frames these consequences in terms of “damage” and “harm” arising out of CPR violations, even if the content of these problems could correspond to violations of ESCR. This CPR framework allows the TRC to hold the state responsible for not only acts of its own agents, but of third parties as well, thus including harm caused by terrorist groups and auto-defense committees—since all parties to the conflict took actions “against the personal rights and assets of the population.”⁸⁶

The TRC documents the many ways in which these abuses occurred: in

81. *Id.* at 22.

82. Farmer, *supra* note 6, at 7.

83. Limburg Principles, *supra* note 43, at ¶ 65.

84. AMARTYA SEN, DEVELOPMENT AS FREEDOM 8 (1999).

85. Hatun Willakuy, *supra* note 66, at 353-410. For the unabbreviated chapter on the consequences of the conflict, see TRC Final Report, *supra* note 12, at vol. VIII, pt. 3.

86. Hatun Willakuy, *supra* note 66, at 395.

addition to actions taken against life, personal liberty and physical and mental integrity, there were also robberies and forced acquisition of farm animals and herds (such as cows, pigs, sheep, or chickens) and crops (such as corn or potatoes); invasion and looting of stores, which included taking not only foodstuffs but also other merchandise like clothes, farming equipment, and electronics. The TRC explains that “[t]he robbery of animals and food goods, in general, were forms of destruction of the principal sources of income and subsistence for the peasants and villagers.”⁸⁷ Many families and communities also lost productive members, especially men who generated income. Others were forced to discontinue their studies, either because they were displaced or imprisoned.

In addition, infrastructure suffered when countless houses, schools, community centers, and health posts were burned. The violence also destroyed roads, bridges and electric towers. In some instances, whole communities were razed. The Peace Census conducted by the Peruvian Minister of Development and Women highlights the collective nature of the damage, estimating that of 4,758 communities in the six most highly affected regions, 495 demonstrated “very high” levels of affectation and 198 “high levels,” 366 “medium high levels” and 741 “medium levels.”⁸⁸ As is typical of internal armed conflict of this type, this destruction and abuse created a high incidence of physical and mental health problems, at both the individual and community level.⁸⁹

Together, all of this destruction simply made the already poor even poorer.⁹⁰ The damage, wrought sometimes as long as 25 years ago, continues to cause innumerable families and communities to find themselves unable to recuperate social and economic stability and security. The TRC concludes:

In this way, then, the internal armed conflict paralyzed the process of development of the rural world, and left grave consequences in the productive structure, social organization, educational institutions and *proyectos de vida* (life projects) of the affected population. Adding these repercussions to those analyzed above with respect to human capital and the ransacking and destruction of the community assets, it is possible to conclude that the process of violence left a despairing economic panorama with an immense number of affected people, to whom society and the State owe

87. *Id.* at 398.

88. E-mail from Santiago Soriano Perea, Director of Peace Promotion, General Department of the Displaced and Culture of Peace, Minister of Women and Social Development (Mar. 30, 2007) (on file with author).

89. See generally Lisa J. Laplante & Miryam Rivera Holguin, *The Peruvian Truth Commission's Mental Health Reparations: Empowering Survivors of Political Violence to Impact Public Health Policy*, 9 HEALTH & HUM. RIGHTS: AN INT'L J. 137, 138 (2006) (“It has become an undeniable presumption that armed conflict and political violence cause mental suffering and long-term mental health consequences for individuals and communities caught in episodes of mass violence.”).

90. Hatun Willakuy, *supra* note 66, at 399.

reparations.⁹¹

The magnitude of the problem provoked the TRC to conclude that this paralysis of development is “a persistent phenomena in diverse forms [that continues] until today.”⁹² Perhaps for that reason, when it went to systematize the demands of victim-survivors, the TRC found that it is precisely these social, economic and cultural inequalities that an overwhelming number, particularly those in rural communities, want repaired.⁹³

C. Discussion: TRC Findings Reinforce Indivisibility Concept

Distinguishing the boundaries between CPR and ESCR in Peru is like trying to isolate the fractals of a kaleidoscope, presenting a real life example of the indivisibility described in the Maastricht Guidelines. While complicated in academic jargon, those who live this situation can put it in plain terms. As one victim-survivor from Peru’s region of La Mar explained during a recent leadership workshop in Ayacucho:

[T]hey look at us poor people like dogs, as they say “how much you have is how worthy you are, and if you have nothing you are worth nothing.” But they blame us for becoming poor. But in our villages we had cows, goats, potatoes . . . but we had to escape [the violence] and they forced us to become poor.⁹⁴

Spun in legal terms, war also violates ESCR.

The practical experience of victim-survivors who suffer as much from the harm caused by political violence as from poverty and social exclusion makes any attempt to divide rights into a nonsensical exercise. As former United Nations High Commissioner of Human Rights Mary Robinson notes:

While the privileged may debate the relative value of one set of rights over the other, the poor, denied access both to health care and to justice, deprived both of economic security and political power, are acutely aware of the indivisibility of rights. The rights to food, water, health, education, housing, personal security, justice and dignity itself are, for the poor, as equal and inter-dependent as

91. *Id.* at 409.

92. *Id.* at 406.

93. *Id.* at 400.

94. Interview with youth leader from La Mar, Peru, in Ayacucho, Peru (Dec. 10-11, 2005) (at workshop “Capacitación para los y las Dirigentes de las Organizaciones de Afectados por el Conflicto Armado Interno.”) (transcript on file with author).

they are elusive.⁹⁵

In fact, post-conflict contexts present an important opportunity to begin melting the “artificial distinctions” between the two bodies of rights, showing they are “permeable” and “merging” despite ranking or designation.⁹⁶

Moreover, a careful survey of the TRC’s findings implicates the Peruvian state’s responsibility for failing to meet the Committee on Economic, Social and Cultural Rights’ “minimum core obligation” test.⁹⁷ In this way, the TRC final report may provide *prima facie* evidence that the government violated or permitted the violation of the ESCR of the populations most affected by the war. What is more, one could argue that the State failed this test *before, during* and *after* the internal armed conflict, and that this violation continues today as long as these conditions go unaddressed.

In its Final Report, the TRC does not articulate such a claim. It never presents its findings of state actions and omissions as *per se* violations of ESCR. When the author consulted Felix Reategui, a member of the TRC’s committee that prepared the Final Report, he clarified that the TRC:

[D]id not deal with these themes using a language of violating ESCR rights, because its juridical framework and mandate referred to violations of the nucleus of human rights. But this does not mean that the TRC denied or did not recognize the juridical category of ESCR, and eventually, their enforceability, only that it was asked to look at other problems and concrete actions.⁹⁸

Instead, the TRC invokes formal legal arguments based on international treaties related to CPR, such as the ICCPR, as well as international humanitarian law and international criminal law.⁹⁹ The failure to articulate the ESCR angle of violations is perhaps a lost opportunity to acknowledge the legitimacy of these “secondary” rights.

For example, while examining the psychosocial harm caused by the armed conflict, the TRC could have presented contexts of war as violating the right to health, thus contributing to a broader definition of this social right, hence adopting the “obligation of conduct” approach.¹⁰⁰ Assuming

95. UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, MARY ROBINSON, DEVELOPMENT AND RIGHTS: THE UNDENIABLE NEXUS (June 26, 2000), *available at* <http://www.unhchr.ch/huricane/huricane.nsf/0/F31C625AA489D31BC125690A0053C8DE?opendocument>.

96. Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 81, 90 (1998).

97. See *supra* text accompanying note 59.

98. Email from Felix Reategui, Coordinator of Research, Instituto de Democracia y Derechos Humanos Pontificia Universidad Católica del Perú (June 6, 2006) (on file with author).

99. Hatun Willakuy, *supra* note 66, at 30.

100. See *supra* text accompanying note 61. For specific discussion on health, see Laplante &

the broader approach to determining violations would, in turn, require new innovations in reparation plans. I would argue, however, that in the case of the TRC, which never articulates the ESCR angle, its recommendations for reparations nevertheless left a “back door” to addressing ESCR violations.

III. REPARATIONS AND THE INDIVISIBILITY DEBATE

The topic of reparations for human rights violations is increasingly important in the field of transitional justice.¹⁰¹ Awarding pecuniary and non-pecuniary measures to victims of human rights violations—such as disappearances, extrajudicial killings, unjust detention, torture and rape—is complementary to traditional justice measures, especially as a way to restore human dignity and redress harm caused by human rights violations.¹⁰² Reparations also take on preventive purposes, holding the State accountable for its acts and omissions, thus fighting against impunity.¹⁰³ In considering its findings, the TRC recognized the importance of creating a comprehensive reparations plan that served these multiple purposes, and it did in fact generate a comprehensive plan.

As will be discussed below, in taking steps towards implementing the plan that the TRC produced, however, the government’s attempts to include reparations for ESCR violations have generated confusion and tension. Victim-survivors view these reparations as insufficiently responsive to CPR violations, and interpret them as pre-existing obligations of the state to promote development.

A. The Plan Integral de Reparaciones

The TRC presented its Final Report after two years of investigations along with its final recommendations and *Plan Integral de Reparaciones* (PIR) (Integral Reparations Plan).¹⁰⁴ The PIR was the product of more than 40 workshops that the TRC’s “reparation team” convened to involve victim-survivors in determining their needs and presenting their demands for

Castellon, *supra* note 89.

101. See Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in THE HANDBOOK OF REPARATIONS 484-85 (Pablo de Greiff ed., 2006) [hereinafter de Greiff] (discussing international law developments suggestive of “wider interest in reparations as provided to a victimized group, especially in the context of transition from authoritarian regimes”; noting a general shift from a concern with dispute settlement to human rights).

102. See Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228, 228 (2007) (“The authors’ observations of Peru’s transitional justice experience and the opinion of victim-survivors reveal that reparations can be considered just as important as criminal trials, making both justice measures a legitimate form of redress.”).

103. See generally Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations and the Duty of Prevention*, 22 NETH. HUM. RTS. Q. 347 (2004) [hereinafter Laplante].

104. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.2.

reparation measures.¹⁰⁵ Perhaps for that reason, to date the PIR figures as one of the most comprehensive reparation plans resulting from a truth commission process. Its components include symbolic reparations, attention to physical and mental health, educational opportunities, restitution and rehabilitation of citizen rights, collective reparations and individual economic reparations.¹⁰⁶ Beneficiaries of these measures include both direct and indirect victims, such as families of the disappeared and extra-judicially killed. Direct victims include those who were displaced, forcefully and/or unjustly imprisoned, recruited by terrorist groups, tortured, raped and otherwise injured.¹⁰⁷

The TRC presents the framework for a national reparation policy with a comprehensive ("integral") approach to reparations, including both individual and collective measures. The TRC explicitly notes that this approach allows the government to respond to "patterns of violations and to the ethnic-cultural dimension."¹⁰⁸ At the same time, the PIR is proposed as a response to the "nefarious consequences of the violence."¹⁰⁹ The text also refers to the link to the more insidious social and economic conditions, which trace back hundreds of years before Peru's recent conflict where the TRC acknowledges that its mandate responds to:

the last stage of a long tragedy lived by an important segment of the national population, which, given the ethnic and racial marginalization of the Andean majorities and Amazon minorities, the scorn and oppression, the abandonment by the State, and the growing poverty in recent years, resulted in grave crimes and human rights violations.¹¹⁰

In effect, the PIR seeks to dignify those who have suffered and at the same time help them become full citizens, making possible the vision of a new future "beyond the precarious conditions of their prior life."¹¹¹ Text in the TRC's section *Hacia una politica nacional de reparaciones* ("Towards a national reparations policy") explains that "with its application, [the PIR] will contribute to improving the quality of life of the population and open possibilities of cultural, social and economic integration for those who many times not only suffered poverty and exclusion but also suffered directly the consequence of recourse to violence."¹¹² Thus, the PIR seems to at least facially address violations of both CPR and ESCR.

Despite these textual excerpts which imply an adoption of the indivisibility of rights approach, the PIR never explicitly characterizes itself

105. Interview with Julie Guillerot, TRC Reparations Office Member, in Lima, Peru (Dec. 15, 2005) (transcript on file with author).

106. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.2.

107. *Id.* at 149.

108. *Id.* at 145.

109. *Id.* at 139.

110. *Id.* at 140.

111. *Id.*

112. *Id.* at 146.

as a remedy for violations of ESCR. In this way, it remains consistent with the rest of the TRC's cautious approach on this issue, as discussed above. Instead, the PIR clearly refers to the violation of civil and political rights for its legal justification.¹¹³

B. Government Implementation of the PIR: Mixing Reparations and Development

Although the TRC did not choose to present the PIR as responding to both CPR and ESCR violations, in its attempt to implement the PIR the delineation seems to be constantly blurred. While "development" generally refers to programs and projects that build the social and economic infrastructure of local communities—such as building health posts and schools and assuring services in health and education—reparations seek to repair actual damage suffered by a human rights violation. In some cases the form of reparations may resemble development-like measures in content (such as a new school in a community whose school burned down in the war), but reparations also contemplates other measures such as monetary compensation, restitution of rights, and symbolic reparations, among others, that do not necessarily resemble development and more clearly emanate the sentiment of "repairing" harm. Yet reparations measures, which look like development, are causing great confusion, even controversy and confrontation. The root of this problem seems to be simple reality that makes the theoretical task of an administrative plan of reparations lose its clarity in practice.

Part of the confusion arises out of the government's approach to reparations, as first made apparent by former President Alejandro Toledo's response to the TRC's Final Report in November 2003. Toledo presented his *Plan de Desarrollo y Paz* (Plan of Development and Peace) as the means for implementing the PIR. His decision met with immediate outcries from victim-survivors who publicly criticized the President's confusion between reparations and development.¹¹⁴ Yet civil society's position became less clear, sometimes confusing the issue, when choosing pragmatism over principle. For instance, when the government announced a proposed subsidy program for the poor that would apply to zones affected by the conflict, a debate ensued as to whether those working towards the implementation of reparations should commandeer this subsidy program by inserting their reparations agenda. The rationale was quite simple. Given the political realities and the lack of will to fund reparations, reparations advocates assumed a practical approach that diluted the strict legal principle that reparations correspond with damages caused by CPR. Pragmatism dictated the importance of using any available route to

113. *Id.*

114. Lisa J. Laplanche, *Reparation for Justice* (Dec. 18, 2003), available at <http://www.praxisweb.org/repairjust.pdf>; Mensaje Del Presidente Alejandro Toledo Sobre El Informe De La Comisión De La Verdad Y La Reconciliación (November 22, 2003), available at <http://www.justiciaviva.org.pe/otros/mensajepresidente.doc> (last visited Feb. 22, 2007).

address the real needs of victim-survivors.

Thus, in the end, the government decided to implement its poverty subsidy program, *Juntos* ("together"), starting in the poorest regions of the country recognizing that the brunt of the war took place in these regions.¹¹⁵ Symbolically, the first beneficiaries of the program *Juntos* belonged to the community of Chuschi, Ayacucho where SL first started its violent campaign.¹¹⁶ Those who qualify for the program receive 100 *soles* (approximately U.S. \$30) every month, conditioned on their children attending school. Fieldwork confirms that members of these villages believe that this program is intended for victim-survivors of the armed conflict, yet many times see it going to non-victim-survivors, causing confusion and resentment.¹¹⁷

Meanwhile, in 2005, the National Congress approved a law that created the PIR, incorporating almost all of the recommendations made by the TRC except provisions for economic reparations.¹¹⁸ The law remained inactive for a year despite pressure from civil society, until the Council of Ministers and the President approved its regulation.¹¹⁹ However, prior to this process the Executive had already issued an Executive Decree to create the "Plan Integral de Reparaciones: Programación Multianual 2005-2006," which provided for preliminary reparations measures in eight of the most affected regions.¹²⁰ This Decree directed each of the relevant ministers (health, education, housing, labor) to designate a part of their normal budget towards reparations. Given already tight budgets, this avenue for implementation has had only modest results. Often these ministers simply waive victim-survivors into pre-existing development programs aimed to address poverty, such as the national health security program for the poor, as opposed to creating special programs designed specifically for the needs of victims-survivors.¹²¹

In 2005, the Peruvian Congress also approved 10 million Peruvian *soles* (approximately U.S. \$3,076,923) towards executing the PIR, which was funneled through the Minister of Women and Development's office of

115. OXFAM, POBREZA Y DESARROLLO EN EL PERU, INFORME ANNUAL 2005-2006 144 (2006), available at http://www.oxfam.org.uk/what_we_do/where_we_work/peru/downloads/Pobreza_y_desarrollo_2006.pdf (last visited Feb. 22, 2007).

116. Sheila Díaz, '*Juntos* se inauguró en la población de Chuschi, LA REPUBLICA (Sept. 8, 2005), available at http://www.larepublica.com.pe/index.php?option=com_content&task=view&id=88248&Itemid=483&fecha_edicion=2005-09-08 (last visited Feb. 22, 2007).

117. This statement is based on the author's personal experience in the field.

118. Law No. 28592 (Jul. 29, 2005), available at <http://www.idl.org.pe/educa/PIR/28592.pdf>.

119. Reglamento de la Ley No. 28592, Ley que Crea el Plan Integral de Reparaciones PIR, available at <http://www.idl.org.pe/educa/PIR/reglamentopir.htm> (last visited Feb. 22, 2007). For examples of criticism from civil society, see Coordinadora Nacional de Derechos Humanos, Press Alert: Demandamos La Inmediata Aprobación Del Reglamento De La Ley De Reparaciones, Las víctimas no pueden esperar (May 11, 2006), <http://www.dhperu.org/index.php?link=139&pag=15>.

120. Decreto Supremo N° 047-2005-PCM (July 7, 2005), available at <http://www.idl.org.pe/educa/PIR/047.pdf>.

121. See ROXANA CASTELLON & LISA J. LAPLANTE, LOS AFECTADOS POR EL CONFLICTO ARMADO INTERNO DEL PERU: EXIGIENDO EL DERECHO A LA SALUD MENTAL (2005).

Fondo Nacional de Cooperación para el Desarrollo (Foncodes) (National Office of Development Cooperation). This funding went towards improving infrastructure, such as mending school buildings and health posts whether or not they were specifically damaged in the war.¹²² The government also recently promised to begin implementing collective reparations in some 300 communities in the zones hardest hit by the violence, earmarking 45 million Peruvian soles (approximately U.S. \$14,200,000) for infrastructure for education, health and production projects.¹²³ However, the new Executive Secretary of the *Comisión Multisectorial de Alto Nivel* ("CMAN"), the national commission charged with overseeing the implementation of the PIR in general, explained to civil society that the reparations would be distributed through a competition, with the best projects winning funding.¹²⁴ Thus, one member of civil society has noted that the government was taking a position that amounted to "I violated your rights, but you have to compete for your reparations."¹²⁵

Meanwhile, CMAN supervised regional "Consejos de Reparaciones" (Regional Reparation Councils) that designed reparation programs, often with the participation of representatives of the various government sectors, civil society and victims. Many of these proposed programs emphasized collective reparations that more closely resembled development programs, as opposed to measures to repair damage from the war, thus requiring CMAN to reject them given its understanding that reparations must respond to actual damage caused by the conflict.¹²⁶ In addition, some regional governments have begun to develop their own reparation plans, while also encouraging victim-survivors to lobby for reparations in the participatory budget process—although it applies only to the development budget in competition with other community interests.

In his first speech to the national congress, the new Prime Minister Jorge del Castillo expressed the newly elected government's support for the reparations recommendations issued by the TRC and the understanding of the State "needing to turn its eyes to the highlands of Peru where there is the most extreme poverty."¹²⁷ In this way, he explains that preexisting social development programs like *Juntos* and *Agua para*

122. Interview with Roberto Arias Flores, Director, Foncodes, in Lima, Peru (July 19, 2006) (transcript on file with author).

123. *Reparaciones Colectivas en Abril*, LA PRIMERA, Jan. 23, 2007, available at <http://www.ednoperu.com/noticia.php?IDnoticia=37613>.

124. See Jesús Aliaga, Executive Secretary of CMAN, Remarks Before the Grupo de Trabajo de Reparaciones (Feb. 16, 2007) (announcing that the competition World be disbanded, no doubt due to pressure and criticism) (notes on file with author).

125. Comment before the Grupo de Trabajo de Reparaciones (Jan. 29, 2007) (notes on file with author).

126. Interview with Jaime Urrutia, former Executive Secretary, CMAN, in Lima, Peru (June 28, 2006) (transcript on file with author).

127. Jorge Del Castillo, Prime Minister of Peru, Exposición del Presidente del Consejo de Ministros Dr. Jorge Del Castillo Galvez ante el Congreso de la Republica 50 (Aug. 24, 2006), available at http://www.pcm.gob.pe/Prensa/ActividadesPCM/2006/Agosto2006/24.08.06_DiscursoCongresoJDC.pdf.

Todos (Water for All) should be oriented to the zones most affected by the conflict. He emphasized collective reparations and those related to education and health, promising to deliver 33 educational centers and 41 health centers to the hardest-hit regions.¹²⁸

In sum, most of the government's reparation efforts to date closely resemble development measures, and do not necessarily correspond to specific damage caused by the war.

C. Confusion and Frustration: Victim-Survivors Perceive the PIR as Development, Not Reparations

The PIR was intended to provide measures of "recognition and reaffirmation" specifically for CPR violations.¹²⁹ Instead, they are redressing historic exclusion and lack of social services that are not limited to victims of the armed conflict.¹³⁰ Approaching reparations as a means to finance development pits "the poor against the poor-victims" in the struggle for limited resources, as one victim-survivor explained to the author.¹³¹ Indeed, many victims complain that the reparation measures to date are part of the pre-existing obligation of the state to respect, promote and protect ESCR and the RTD.¹³²

Interestingly, in dialogue with the state, victim-survivors hear repeatedly that the government has no funds for individualized economic reparations—which would respond more closely to the actual harm of the conflict—yet continue to see sufficient funds designated for development programs. Savvy to this ploy, most victims remark that the government simply lacks political will to prioritize all of the PIR, in particular individualized economic reparations.¹³³ Thus, reparations in Peru tend to take symbolic and collective forms, such as memorial parks, as well as general programs in health and education. In all of these efforts, the government has eliminated, sidelined or otherwise omitted individual economic reparations. Importantly, it is common, and even expected, for governments to resort to development-like measures because they are logistically and politically more feasible.¹³⁴

128. *Id.*

129. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.2, at 141. For a discussion on the distinctions between collective and individual reparations and their overall purposes see, Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 121 (Eric Stover & Harvey M. Weinstein eds., 2004).

130. Lisa Magarrell, *Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice*, 22 WINDSOR Y.B. ACCESS JUST. 85, 93 (2003) [hereinafter *Magarrell*].

131. This statement is based on the author's work, which involved talking with leaders of victims' groups.

132. *Id.*

133. *Id.*

134. For a discussion of the issue of political will and financing reparations, see Alexander Segovia, *Financing Reparations Programs: Reflections from International Experience*, in de Greiff,

The specific diagnostic approach used to develop the PIR may help explain the confusion. In designing the various components of the PIR, the *Grupo sobre el Plan Integral de Reparaciones (GPIR)* (Integral Reparations Plan Group) charged with designing the PIR consulted victim-survivors about their needs, which prompted assessments not necessarily reflecting specific damages caused by the conflict.¹³⁵ Indeed, the PIR itself explains that “the basic premise of the reparation process departs from the necessities that the population identifies as theirs.”¹³⁶

The majority of the participants in the workshops organized by the GPIR came from the poorer sectors of society, which is unsurprising given that the majority of victims belong to this population. Thus, when asked about their needs, their responses reflected what could be considered lack of protection of their ESCR and RTD.¹³⁷ In rural communities, local mores also prioritized collective measures to benefit the whole community. Yet, while sometimes these collective needs arose out of specific damage caused by the war (such as replacement of a burned school building), at other times they did not (such as potable water). A similar issue arises in answers to a question about expectations asked of the 17,000 people who testified for the TRC. The GPIR relied heavily on a random sample of these forms from Ayacucho, finding answers that reflected the tendency to request collective reparations that respond to poverty and exclusion.¹³⁸

Administrative reparation programs may simply be incapable of maintaining the traditional features of conventional reparations. As mentioned, reparations (for CPR violations) traditionally respond to individualized assessments of damages caused by a violation and seek to make victim-survivors whole by returning them to the condition they were in before the violation occurred.¹³⁹ Yet, when intended beneficiaries participate in decision-making about reparation measures, they may express their needs, but they do not necessarily assess damages. Thus, some proposed projects may have no direct link to the political violence, but are rather intended to satisfy victim-survivors’ ESCR.¹⁴⁰ Moreover,

supra note 101, at 650.

135. See JULIE GUILLEROT & LISA MAGARRELL, *REPARACIONES EN LA TRANSICION PERUANA: MEMORIAS DE UN PROCESO INCABADO* 55 (2006) [hereinafter *Guillerot & Magarrell*].

136. *Id.* at 157.

137. This statement is based on the author’s personal experience working in the field. The sentiment has been repeated in countless confidential interviews.

138. The author thanks Jocelyn Getgen and Kaya Williams for sharing this discovery made during their research at the Centro de Información para la Memoria Colectiva y los Derechos Humanos, Lima, Peru, where the TRC’s archives are stored.

139. For a general discussion on reparations, see DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* ch. 4 (1999). See also Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/Res/60/147 (Mar. 21, 2006); Laplante, *supra* note 103, at 351-55 (discussing compensatory function of reparations).

140. Note that the PIR envisioned a process of assessing such damage, taking into consideration the level of concentration of individual violations in the area, whether the community was razed, the existence of forced displacement, fractures in the community’s institutional life (including killings of community leaders), and loss of family and community

given the number of victims, the inflexibility of an administrative reparation plan, and the focus on non-pecuniary measures, it is nearly impossible to tailor reparations to compensate for individual damage claims. Since many suffered from serious violations of their ESCR prior to the political violence, it is not necessarily a place they wish to return in order to feel "whole." Instead, they want to see those same conditions repaired.

Dire needs produced by poverty and exclusion shape what many victim-survivors perceive as preventing them from improving their well being. These are the conditions that constitute the wrong that needs to be made right (as opposed to the harm caused specifically by acts of political violence). Here, Peru's experience resembles others in the region; that is, in transition from political violence and authoritarian legacies, widespread poverty and social exclusion complicate recovery in the recuperation of the rule of law more than simply damage from acts of political violence.¹⁴¹

Although many victim-survivors express a desire for economic reparations, they often remain unsatisfied with the idea of one-time payments or simple band-aid-like solutions. Many ask for measures in health and education, especially for their children. Here, they talk of wanting to acquire "capabilities" and "opportunities" to improve their lot. When asked what would satisfy their demands for reparations, they name assistance with productive capacity (more farm animals, farm machinery, technical skills) as well as education for their children, even those born after the violence ended and thus not directly affected.¹⁴² In other words, reparations mean allowing them to live a dignified life, and not one of poverty. Lisa Magarrell, Senior Associate of the International Center for Transitional Justice (ICTJ) of New York, who consulted on the development of the PIR echoes this idea, viewing reparations as "a process" that move towards a new future and establishes "rights, capacities, opportunities, and quality of life that were lost to political violence . . ."¹⁴³ Importantly, this marginalized population never had some of the assets they now seek.

The term "well-being" as used by members of the Peruvian rural communities to propose how they will finally feel repaired¹⁴⁴ has interesting reverberations with what Professor Sengupta interprets as "well-being" as it applies to the RTD. He explains that it "extends well beyond the conventional notions of economic growth to include the

infrastructure. See Guillerot & Magarrell, *supra* note 135, at 48. However, as discussed in the previous section, it may be difficult to conduct this type of diagnosis in practice.

141. Kees Koonings & Dirk Kruijt, *Introduction: Violence and Fear in Latin America*, in *SOCIETIES OF FEAR: THE LEGACY OF CIVIL WAR, VIOLENCE AND TERROR IN LATIN AMERICA* 12-15 (Kees Koonings & Dirk Kruijt eds., 1999) (discussing how poverty, informalization, and social exclusion undermined public order in Peru and other countries in region).

142. These statements are based on the author's personal experience reading questionnaires and attending meetings and assemblies in which these requests were consistently repeated.

143. Magarrell, *supra* note 130, at 92.

144. This statement is based on the author's personal experience.

expansion of opportunities and capabilities to enjoy those opportunities, captured in the indicators of social and human development, which in turn expand their substantive freedoms.”¹⁴⁵ Similarly, Amartya Sen views poverty as deprivation of basic capabilities (and not just low incomes), capabilities that would give individuals expanded choice or freedom to be and do things that they value.¹⁴⁶

The right to development as the right to a process of development is not just an umbrella right or the sum of a set of rights. It is the right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value.¹⁴⁷

The resulting “substantial freedoms” arising from these capabilities represent the pinnacle that all humans strive for, since they entail leading “the kind of lives they value or have reasons to value.”¹⁴⁸ Of course, what is “valued” depends on the individual and community, and can include decent physical and mental health, housing, adequate food, being literate or educated, the ability to associate and speak freely, the space for cultural rituals and practices, among others.

One female youth leader in Ayacucho pointedly speaks of looking from the “angle of necessities.”¹⁴⁹ She admits that because she has education, a career, and income to cover her basic necessities, her demands for reparations greatly differ in comparison with “others who have nothing to eat, are so poor, and continue to be excluded.” Indeed, needs are very diverse. Here, one sees a distinct class distinction. The *Madres de la Plaza de Mayo* in Argentina, families of the disappeared, refused reparations as “blood money,” but this protest must be seen as a luxury belonging to victim-survivors from the middle class.¹⁵⁰ For the very poor, mere survival prevents such principled stances. Reparations become the small “help” they need just to get by.

D. Causes of Confusion: Mixing Reparations and Development

1. Original Intent of the PIR: The Difficulty of Dividing Rights

Why does the text of the PIR suggest recognition of the indivisibility approach when its designers never explicitly articulate the PIR as a remedy for all rights, including ESCR? Perhaps the explanation rests in the

145. Sengupta, *supra* note 5, at 848. For further discussion, see POLLY VIZARD, *POVERTY AND HUMAN RIGHTS* (2006).

146. Sengupta, *supra* note 5, at 885.

147. *Id.* at 868.

148. SEN, *supra* note 84, at 24-25.

149. Interview with female youth leader, in Ayacucho, Lima, Peru (February 21, 2006) (transcript on file with author).

150. See Brandon Hamber & Richard A. Wilson, *Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies*, 1 J. HUM. RTS. (2002).

impossibility of dividing rights.

The history of the PIR's development reveals that its designers struggled with the indivisibility principle in their deliberations, ultimately rejecting an interrelated approach. Magarrell provides a thoughtful explanation. Her narrative reveals the efforts of the GPIR to sort out the intersection of claims for violations of all rights, including ESCR, to respond to "the demand for bringing about change to overcome social inequities."¹⁵¹

The GPIR struggled with the proper point of entry for determining reparations, choosing between a focus on the violations themselves or the harm they cause.¹⁵² Indeed, both the causes and consequences of the conflict provided an important backdrop for this work, causing the GPIR to consider issues of urban-rural, economic, and ethno-cultural divisions. The idea of a broad sense of justice informed its approach, with development policy becoming highly relevant to responding "to how the impact of the violence deepened already existing social problems (such as poverty)..¹⁵³ As Magarrell explains:

One technical advisor argued that because human rights are indivisible and the majority of victims of violations of civil and political rights during the conflict also suffered violations of their economic and social rights, a reparations program must address the whole constellation of problems. He also noted that the direct and indirect effects of violence are similar. For example, the mental health problems of a brother of someone who was executed by state agents may be no different from the problems of the cousin or neighbor who witnessed the act. The educational loss to a child who lost his father is similar to that of the child who had no schooling because the school was destroyed or the professor disappeared. Moreover, what good do reparations for violations of civil and political rights do if one has no employment or food? Thus, he argued, reparations should aim to reestablish all rights.¹⁵⁴

As a result, they developed what Magarrell calls "the early model" which sought to repair violations of all generations of rights.¹⁵⁵ In this model, reparations became a way to intervene and stop a cycle of violence, and thus contribute to "sustainable peace, democratic strengthening, and development."¹⁵⁶ This rationale rested on reestablishing and developing "social, political, cultural, and legal conditions that directly serve to stop political violence and provide guarantees of non-recurrence."¹⁵⁷ In this

151. Magarrell, *supra* note 130, at 86.

152. *Id.* at 87.

153. *Id.* at 92-93.

154. *Id.*

155. *Id.* at 91.

156. *Id.*

157. *Id.* at 92.

manner, the reparations team clearly captured the indivisibility principle.

Despite this early contemplation of the indivisibility of rights, the GPIR found this model to be unmanageable, at least in terms of their prescribed task of designing an administrative program to address a specific time-frame of the internal armed conflict. As Magarrell puts it, the team began to recognize the many “generations” of violence: “violations caused by the consequences of violations—expanding harms—and . . . the circle of those affected would grow larger as this analysis was carried out.”¹⁵⁸ Here, “[c]ausation issues became mixed with other underlying social problems that exacerbated or coincided with harms caused directly by the abuses experienced.”¹⁵⁹ Thus, by looking at the causes and consequences of political violence, instead of only the specific violation of civil and political rights, the early model created an “enormous universe of harm” since every kind of socio-political, socio-cultural, economic problem became relevant.¹⁶⁰

Consequently, the GPIR adopted a narrower concept of reparations and presented the PIR only as a step towards justice, with the understanding that reforming structural social problems was a larger undertaking better left to recommendations of institutional reform. Abandoning the first model, the GPIR dropped an explicit articulation of the indivisibility approach in its presentation. In this vein, the TRC final report clarifies that the “PIR cannot and should not be considered as one more instrument of social policy.”¹⁶¹ Furthermore, as the PIR carefully specifies:

[The] PIR does not seek to resolve poverty, exclusion and inequality, which have a structural character and respond to the overall functioning of a political and economic system. While some of its programs can and should contribute to improving the quality of life of victims and their families, its central objective is reparation and recognition of the victims as human beings, whose fundamental rights have been violated. This does not mean that the State should not also carry out a policy of social development aimed at attacking the roots of poverty and inequality, and the TRC provides, in other parts of this Report, concrete proposals of necessary institutional reforms, but the PIR has another purpose.¹⁶²

Indeed, the TRC did include a section on “Institutional reform” to help inform the future work of the State to “modify the conditions that generated and deepened the internal conflict.”¹⁶³ These recommendations specifically respond to Article 2 of the TRC’s Mandate, which called on it to

158. *Id.*

159. *Id.* at 93.

160. *Id.* at 91.

161. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.2, at 148.

162. *Id.*

163. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.1, at 109.

analyze political, social and cultural conditions, in order to recommend "institutional, legal, educative and other reforms as guarantees of prevention."¹⁶⁴ These recommendations include, among others, suggested measures for reforming the legal system, the armed forces, and basic services in education.¹⁶⁵

As a whole, the TRC Final Report presents a tool for setting new agendas in state policy to promote economic and social justice—the root of the violence.¹⁶⁶ As Magarrell explains, "The TRC's findings as to the consequences of the violence could, if heeded, provide a basis for devising other State policies responsive to the broader range of harm visited on specific groups within Peruvian society and to the underlying structural inequities at work in that process."¹⁶⁷ However, more than three years after the presentation of the TRC's final recommendations, institutional reform receives little to no emphasis in the country's efforts to address the findings of the TRC.

The inertia in implementing institutional reform arises out of the original difficulties that caused neglect of social, economic, and cultural rights in the first place. As "second generation" rights they fall prey to the traditional "progressive" requirement invoked by states that face competing societal demands within a context of limited resources.

Interestingly, the GPIR's deliberations foreshadowed many of the problems with the implementation of an administrative reparations scheme that provides collective reparations. For instance, although it acknowledged that reparations can sometimes "resemble" social development programs, the GPIR insisted that social development be addressed through agendas of institutional reform.¹⁶⁸ Yet, as mentioned, the slow-to-start institutional reforms leave the PIR as the sole channel for addressing all of Peru's problems, not just reparations.

The GPIR predicted that if reparations were not directly linked to the occurrence of CPR violations, and thus awarded to direct victim-survivors, they would lose their meaning as reparations for those abuses.¹⁶⁹ Significantly, the GPIR also stated that "by mixing questions of socio-economic entitlement with reparations for violation of civil and political rights, the model might end up simply providing something viewed as a right in any case. This is not just a theoretical point, but one voiced by victims, as well."¹⁷⁰

In response, new discussions directed by the state as well as civil society have suggested that reparation ceremonies and protocols be orchestrated during the delivery of development-like reparations to give them a reparation-like feel. Perhaps this solution reflects not so much a

164. TRC Decree, *supra* note 31.

165. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.1, at 112.

166. Magarrell, *supra* note 130, at 94.

167. *Id.* at 97.

168. *Id.*

169. *Id.* at 93.

170. *Id.*

substantive resolution to the dilemma at hand, as it does a continued confusion over the issue. It certainly risks future tension since victim-survivors are unlikely to be beguiled by cosmetic adornment. In its text, the PIR distinguishes its vision of "reconstruction" from "any other public development program or fight against poverty", perhaps anticipating later confusion.¹⁷¹ Yet in practice the distinction has been lost. So if the TRC anticipated this confusion, why is it happening?

2. The Overlap Between Damages Resulting from ESCR and CPR Violations

Usually reparations in truth commission schemes are presented in terms of responding to the damage caused by violations of CPR. They contemplate restitution whenever possible to "restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred," but when impossible, should be replaced with compensation, rehabilitation, and satisfaction.¹⁷²

The experience with the Peruvian TRC, however, demonstrates the difficulty of separating the *overlap* of damages arising out of violations of CPR and ESCR. When the same event or situation gives rise to violations of both CPR and ESCR, it is difficult to distinguish the origin of the harms to be remedied, even if the common goal is to "make victims whole."¹⁷³ The brief illustration of Peru's experience suggests this relation: the violation of "first generation" rights, such as extrajudicial killing, disappearances, and arbitrary detention, arose out of a context complicated by the violations of the "second generation" of rights, that is, the failure to attend to basic social and economic needs. In the end, the violation of CPR only exacerbated the violation of ESCRs, although typically framed as "damage" and "harm" caused by CPR. International human rights law provides support for the proposition that the right to reparation exists for violations of all "generations" of rights.¹⁷⁴ Thus, reparations suggested by a truth commission that reveal the overlap of CPR and ESCR violations could be considered as responding to violation of these multiple "generations" of rights.

Unlike the more traditional concept of reparations in which measures are prompt and finite, here reparations mingled with development

171. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.2, at 194.

172. G.A. Res. 60/147, ¶¶19-22, A/RES/60/147 (Mar. 21, 2006).

173. Toebes, *supra* note 2, at 676.

174. See, e.g., Comm. on Econ., Soc., & Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, ¶ 59, E/C.12/2000/4 (Aug. 11, 2000) ("Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.").

involves a process that “consists of a program or plan of policies executed over time maintaining consistency and sustainability with phased realization of the targets.”¹⁷⁵ Importantly, this process depends on and includes the civil and political right to participation, which is recognized as much in the realm of the RTD as it was integrated into the PIR.¹⁷⁶ In this sense, agency underscores the enjoyment of all other rights, since it was the denial of agency, and the social and economic exclusion entailed by that denial, that the TRC blamed for fueling the violence.

In the end, it is social and political inclusion that justify both the PIR and the right to development. The designers of the PIR viewed reparations as an effective contribution to “democratic consolidation, the return of faith in the future and to lay the foundation of a new social pact.”¹⁷⁷ Likewise, the Author’s fieldwork reveals that the core source of “feeling repaired” often relates to finally feeling included in all aspects of Peruvian life. Professor Sengupta presents the idea of the *process* of the right to development, which revolves around the idea of “[e]quity—which is essential to any notion of human rights derived from the idea of equality of all human beings in rights, dignity and opportunity, and is associated with fairness or the principles of a just society — is basic to that process.”¹⁷⁸ Thus, if victim-survivors receive reparations and are still socially and economically excluded, they may still not feel repaired, nor whole.

In this way, the PIR presented reparations as a step towards reconciliation, which entails the inclusion of all voices, especially those historically excluded. Yet, it is unlikely that reparations alone can address historical exclusion. As Professor Sengupta explains, “[e]quity, justice, participation and freedom were peripheral and were raised only as afterthoughts in the national and international development policies. Yet, it is these very notions that comprise the value added by the concept of the right to development.”¹⁷⁹

Indeed, the right to development is intended to “target socially vulnerable groups, as the major victims of exclusion.”¹⁸⁰ Likewise, the notion of human rights was developed to “protect the rights of those who are most likely to have their rights violated.”¹⁸¹ In showing how in practice the PIR comes to assume a similar purpose, at least in the eyes of its beneficiaries, one begins to understand how it has acquired an immense, if not impossible, aim. Victim-survivors look to the PIR not so much to respond to specific damage caused by violations of their CPR, as much as to save them from a life characterized by violations of their ESCR. Yet again, despite all its caution the TRC may have contributed to this

175. Sengupta, *supra* note 5, at 875.

176. PIR makes the participation of its beneficiaries in its development a basic criteria and transversal theme in all of its programs. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.2, at 157.

177. *Id.* at 139.

178. Sengupta, *supra* note 5, at 846.

179. *Id.* at 849.

180. Piovesan, *supra* note 73, at 29.

181. FARMER, *supra* note 6, at 212.

expectation. The PIR itself viewed the “reparatory” nature of these measures as more than a response to losses, since they also provide a “solid base to the collective life” that guarantees future stability and “life meaning.”¹⁸²

IV. LESSONS LEARNED

A. Reparations for What? Using the Truth Commission Reparations as Non-Judicial Mechanisms to Enforce ESCR

As an administrative plan of reparations, the PIR specifically considers itself an alternative to juridical remedies.¹⁸³ It refers to the practical constraints of law, such as legal arguments for restricting jurisdiction, the reality that national courts do not always adequately enforce reparation schemes, and also that such individual remedies do not respond to “systematic and generalized violations.”¹⁸⁴ Interestingly, the PIR warns that this reality does not mean the state can “simply ignore these justified claims for reparations by arguing that no adequate judicial apparatus exists.”¹⁸⁵ Instead, public authorities must respond to the broad and complex universe of victims by adopting other methods and forms of reparations that respond more adequately to the national reality.

Professor Sengupta suggests that the narrow focus on “justiciability” and courts of law should be abandoned in favor of seeking alternative mechanisms for responding to rights violations.¹⁸⁶ In particular, he advocates an emphasis on “provisions for corrective action and enforceable remedies if the obligations are not fulfilled.”¹⁸⁷ One suggestion is “the establishment in each country of a national human rights commission, consisting of eminent personalities from the country itself.”¹⁸⁸ Although not conceived as such, the TRC provides one illustration of what such a commission might look like. This alternative approach of using national commissions includes the ability to issue administrative reparation schemes that, while maybe not binding, nonetheless become authoritative guidance on obligatory follow-up measures.¹⁸⁹

Importantly, administrative reparation schemes like that presented by

182. TRC Final Report, *supra* note 12, at Vol. IX, Part 4, Ch. 2.2, at 194.

183. *Id.* at 144 (citing Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 20 (A. Randelzhofer & C. Tomuschat eds., 1999)).

184. *Id.*

185. *Id.*

186. Sengupta, *supra* note 5, at 859-61.

187. *Id.* at 857.

188. *Id.* at 882.

189. In negotiating the creation of a truth commission, parties may push to include provisions in the decree, statute, or law that makes the commission’s final conclusions binding. Political factors, however, may make this especially difficult. Such was the case in Peru.

the Peruvian TRC do not first require identifying individual culpability. Instead, these schemes hold the state responsible for acts as well as omissions, such as the failure to protect citizens from the acts of third parties, like terrorists.¹⁹⁰ Thus, the “individualized culpability” requirement raised in relation to ESCR becomes moot. Moreover, using truth commission reparation schemes to remedy ESCR circumvents the “progressive” requirement that often allows States to excuse ESCR problems on the grounds of limited budgets. In the case of reparations for civil and political rights, the obligation is immediate and cannot be excused by internal laws or budget constraints.¹⁹¹

Even if truth commissions present CPR violations as the trigger for state liability, and thus for the state’s duty to provide reparations, the commissions still create a mechanism for addressing and remedying violations of the ESCR.¹⁹² Framing economic, social, and cultural rights as civil/political rights in order to increase their recognition and enforceability may undermine their importance. Presenting CPR and ESCR violations together may seem like a manipulative contrivance, but it may provide a more accurate and holistic view of the indivisibility of these types of rights. If we acknowledge the dynamic between these “generations” of rights, we see that CPR and ESCR are complementary. Thus, a single event, condition, or situation may violate the rights of individuals as well as the rights of communities.¹⁹³ Here, “indivisibility” refers to the need for mutual enforcement and fulfillment, as well as to the simultaneous nature of violations.

B. Post-Conflict Recovery with Development

At times, one gets the sense that the PIR has been converted into, or is at least perceived as, a vehicle to solve all of Peru’s problems. As discussed, the GPIR sought to avoid exactly this predicament, abandoning the focus on repairing causes of the internal armed conflict for fear that the PIR would then aspire “to achieve the goals of the whole transitional process instead of just an important piece of it.”¹⁹⁴

Yet by including collective reparations, and as a result of consulting rural victim-survivors, the PIR may have set itself up for the current confusion. Indeed, the PIR included the collective aspect of reparations:

190. Specifically, the TRC adopted the approach that liability arises if the state fails “to prevent or respond adequately to actions of private actors who gravely harm the full enjoyment of human rights.” TRC Final Report, *supra* note 12, vol. IX, pt. 4, ch. 2.2, at 143.

191. See, e.g., Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in de Greiff, *supra* note 101, at 504 (discussing the influence of the *Velasquez-Rodriguez* decision by the Inter-American Court of Human Rights, on this standard, especially in the Americas).

192. Piovesan, *supra* note 73, at 31 (noting that a commission serves as a forum in which plaintiffs can draw attention to violations of ESCR).

193. Alicia Ely Yamin, *supra* note 63, at 406.

194. Magarrell, *supra* note 130, at 94.

[T]o develop a program, structured in phases throughout affected zones of the national territory, in order to mend the social, economic and institutional damage suffered by these affected communities and groups of people, so that they can recuperate basic collective conditions of life and work, especially with a vision of the future, that can be oriented towards reconstruction.¹⁹⁵

Magarrell explains that these collective measures were intended to “contribute to reconstruction and consolidation of communities. The latter, to be developed locally through a participatory process, is aimed particularly at consolidating institutional life, setting productive infrastructure on track, recovering basic services, and generating employment and income.”¹⁹⁶

Collective reparations arose out of the recognition that political violence had an impact on both individuals and communities. A healthy community is a “necessary condition for the fulfillment of the rights and the realization of the development of individuals.”¹⁹⁷ The Right to Development also encapsulates the notion of collective rights not so neatly packaged in traditional individualized reparation schemes, since they focus on “the well-being of *the entire population*.”¹⁹⁸ Individual well-being is often dependent on the collective context, a dimension realized more easily in administrative reparation schemes with collective reparations. Yet the confusion over the PIR relates to its emphasis, until very recently, on collective reparations, as well as social benefits like health and education. In fact, when creating collective reparations, consultants to the GPIR warned of the confusion it might generate, saying these types of measures should have been separated from the PIR and made into a separate reconstruction program to avoid confusion.¹⁹⁹

Peru’s dilemma reflects a broader theoretical question regarding the appropriate relationship between collective reparations and development. Professor Roht-Arriaza discusses how equating collective reparations with development “conflates two separate obligations of government: to make reparation for wrongs it committed, and to provide essential services to the population.”²⁰⁰ Peru’s experience suggests that collective reparations should be accompanied by complementary reconstruction that more explicitly responds to ECRS and development concerns. Maybe this solution merely gives collective reparations another name, but it could nonetheless diminish feelings of deception or confusion by clarifying that

195. TRC Final Report, *supra* note 12, vol. IX, pt. 4, ch. 2.2, at 194.

196. Magarrell, *supra* note 130, at 96.

197. Sengupta, *supra* note 5, at 863.

198. Declaration on the RTD, pmb., *supra* note 44 (emphasis added).

199. Interview with Javier Torres, Executive Director of Asociación Civil Servicios Rurales (SER) (Mar. 15, 2006).

200. Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L. & COMP. L. R. 157, 188 (2004).

reparations are not a cure-all in post conflict recovery.

Indeed, even before the PIR's implementation was underway, Magarrell warned that the PIR would, "not respond to some of the most urgent current-day needs of a large share of the victims, which have to do with basic access to social and economic rights."²⁰¹ She added that given this reality, the PIR would "leave untouched the circular relation of cause and effect in relation to the political violence experienced by victims and thus not repair the harm in its fullest dimension and in a way that could break the cycle of violence."²⁰² However, she admitted that this dilemma relates to the original struggle in the GPIR's deliberations, its own "circuitous route" on "what are the appropriate objectives of a reparations program?"²⁰³ She pointed out that the GPIR decided to keep the PIR's goals limited to contribute to the overall transition process, but not to make it the only vehicle for dealing with the underlying causes of the violence. Indeed, here, it is important to recognize that if reparations are not accompanied by institutional, social and economic reform then the goals of prevention may be frustrated. Moreover, all of these measures quite obviously require political will on the part of the state.

CONCLUSION

The evolving nature of truth commissions over the last thirty years suggests a process of capturing the lessons of preceding commissions in order to continuously improve upon this approach. This evolution also means expanding the expectations of what role truth commissions may play, and how much they can accomplish within the limits of their mandate. For its part, Peru's experience demonstrates the difficulty of separating any analysis of CPR and ESCR, not only in terms of violations but also of reparations, in situations of massive political violence and armed conflict. While Peru's unique social, economic and historical context makes its situation particular, its experience provides new guidance for future truth commissions in post-conflict recovery settings sharing similar demographics. Its own struggle with the indivisibility principle reveals the restorative aspect of attending to the suffering caused by past wrongs, but also the preventive mode of eradicating the roots of these wrongs, thus providing more forward-looking modes of conflict prevention and peacekeeping. Any other approach could be shortsighted.

Given the rising popularity of truth commissions, they may become a more acceptable modality for this holistic approach if given more expanded mandates. Their investigations of episodes of repression and violence, and the social and economic root causes, may continue to provide ample proof that rights cannot be divided. Yet in this process, the recommendations they inspire, whether for reparations, institutional reform, or reconstruction, should be carefully planned and implemented so

201. Magarrell, *supra* note 130, at 97.

202. *Id.* at 97.

203. *Id.*

as not to frustrate the expectations of victim-survivors. The ideal solution would be to ensure that recovery programs integrate both reparations and development to address all the needs of victim-survivors.²⁰⁴ Ultimately, this suggestion first depends on focusing post-conflict recovery on the well-being of victims. Here, the concept of "whole" incorporates a more expansive view that reflects harm suffered from violations of both CPR and ESCR. While some may argue that this recommendation is impracticable, as the GPIR did, reality may make it inevitable – something hindsight only now reveals in Peru.

204. Moreover, development programs that are implemented for an entire population living in substandard conditions (and not only those considered to be victim-survivors), help address the underlying conditions that have fostered, and could again foster, political violence.